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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/708,129	11/07/2000	David N. Spiegel	END920000101US1	1094

45092   7590   12/28/2007
HOFFMAN, WARNICK & D'ALESSANDRO LLC
75 STATE ST
14TH FLOOR
ALBANY, NY 12207

EXAMINER
RUTTEN, JAMES D

ART UNIT	PAPER NUMBER
2192	

MAIL DATE	DELIVERY MODE
12/28/2007	PAPER

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

MAILED

Application Number: 09/708,129
Filing Date: November 07, 2000
Appellant(s): SPIEGEL, DAVID N.

DEC 2 8 2007

Technology Center 2100

Hunter E. Webb, Reg. No. 54,593
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/15/07 appealing from the Office action

mailed 3/20/07

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

Claims 1-20 remain pending and stand rejected. Claims 1-18 have been appealed. Claims 19 and 20 were rejected in the 3/20/07 Final Rejection but were not indicated in the brief as pending, rejected, or appealed.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is

substantially correct. The changes are as follows: Claims 1-20 are not rejected under 35 U.S.C.

§ 112, second paragraph. Rather, claims 1-20 stand rejected under 35 U.S.C. § 112, first

paragraph.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5.960.189	STUPEK et al.	9-1999
5,721,824	TAYLOR	2-1998

Gowan et al., "Y2K Compliance and the Distributed Enterprise" Communications of the ACM,

vol. 42, no. 2 (Feb 1999), pp. 68-73

Boyle et al., "IMS/ESA Sysplex Data Sharing: An Implementation Case Study" IBM Redbooks

(Aug 1997), pp. 31-32

SMP/E Product, Described on page 8 of the originally filed specification

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-20 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

Claims 1-20 contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Independent claims 1, 9, 17, 18, and 19 all recite the phrase "...database of *all* second maintenance items that are *known* as being *able to be installed*...", e.g. lines 6 and 7 of claim 1. While supporting a database of known second maintenance items (page 8 lines 13-22), the originally filed specification does not expressly support a database containing *all* known maintenance items known as being *able to be installed*. There is no description of how any database could possibly contain a list of *all* items that are *known* as being able to be installed. What constitutes *all* items? How is it determined whether something is *able* to be installed? Who is responsible for *knowing* if an item is able to be installed, and how do they acquire this knowledge? The specification does not appear to answer any of these questions, and one of ordinary skill in the art would not know how to make and/or use the invention. Claims 2-8, 10-16, and 20 are rejected as being dependent upon rejected base claims. For the purpose of further examination, reasonable broad interpretation is made in accordance with the specification as being directed to a database with all items that are known by a given entity as being able to be installed.

Claim 20 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

Claim 20 contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. Claim 20 recites: "wherein the database is stored on a different medium than the maintenance application." No description of any storage or medium requirements for either the database or the maintenance application was found in the specification.

Claims 1, 3-9, 11-18, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over prior art of record U.S. Patent No. 5,960,189 to Stupek et al. (hereinafter "Stupek") in view of prior art of record U.S. Patent 5,721,824 to Taylor (hereinafter "Taylor").

As per claim 1, Stupek discloses:

A method of maintaining software on a computer system (See Abstract) *comprising the steps of:*

bringing up first and second host sessions on a computer system (FIG. 1 elements 1 and 2);

starting in said first host session, a software recording application having data on existing first maintenance items that have been previously applied to said computer system See figure 1 reference 5 "Management Information Base", column 3 lines 22-30:

> A management information base (MIB) within the server **maintains basic descriptive information** about each of the resources **available** on the server.

Resources that are currently available and exist on the server, inherently must have been previously applied, otherwise they would not be available.

starting in said second host session, a database application having a database of all

second maintenance items that are known by an entity *as being able to be installed on the*

computer system, and including prerequisite items and corequisite items corresponding to each

of said known second maintenance items See figure 1 reference 9 "Upgrade Database", column 3

lines 44-52:

> In addition to the resource upgrades 7, the CD-ROM contains an upgrade database 9, which stores
> information about each of the upgrade packages 6 (e.g., name and location of the package on the
> CD-ROM, description of the upgrades, and instructions for installation of the package to the
> server), and the individual upgrade objects 8 within each package 6. If the upgrades 7 are provided
> by an on-line service, the upgrade database 9 will also be provided by the service.

and column 7 lines 8-10:

> The database also contains information regarding the dependencies between the package and other
> upgrade objects or packages...

Maintenance items must inherently be known if information regarding them is stored in a

database. As a database is a collection of knowledge, it would not exist without knowledge of its

members. Stupek also discloses storing information for all known updates by referring to "each

of the upgrade packages."

activating a maintenance application on said computer system (figure 1 reference 11

"Upgrade Advisor");

entering a first list of new third maintenance items in said maintenance application See

figure 1 reference 7 "Resource Upgrades", column 3 lines 31-43:

> **Upgrades** to the network resources are provided to a server manager by a distribution medium
> (not shown), such as a CD-ROM. The upgrades 7 may also be provided by an on-line service (not
> shown), such as a bulletin board service administered by a manufacturer of network resources.

Upgrades inherently provide a new version of a product, otherwise they might be called a

"downgrade", or "rollback". Also see column 3 line 57 – column 4 line 5.);

searching said database of known second maintenance items for records matching each

of said new third maintenance items to find records that have said prerequisite items and

corequisite items, See column 4 lines 20-27:

> The upgrade advisor then **retrieves upgrade information from the upgrade database** and
> performs two types of comparisons: a) whether or not a particular upgrade package corresponds to
> a resource on the server, and b) whether or not the version number of the upgrade package
> matches the version number of the corresponding network resource (i.e, whether or not the
> upgrade package represents a true upgrade for the existing network resource).

Also column 7 lines 6-35, especially lines 29-33:

> Therefore, the dependency information in the Package **database 25 describes not only the
> dependencies between packages on the CD, but also all dependencies** between an upgrade
> package and any upgrade not available on the CD.

Also column 4 lines 6-9:

> When the analysis is complete, the **upgrade advisor 11 presents a report** and/or graphical
> display to the user. This output is in the form of **upgrade recommendations**, each supported by
> an explanation of the reasons for upgrade.

The first list is analyzed by the upgrade advisor and modified according to the current

maintenance needs, producing a report, or list, of prerequisites and corequisites.);

Also see column 7 lines 33-35. Since notification of dependency occurs, a search for

dependency information, while not expressly disclosed, is inherent since notification could not

occur without a search for the information.

thereafter determining from said software recording application which items on said first

list have already been received, and adding those items not received to an order list See column

4 lines 20-27 as cited above describes the determination of items that have already been

received; also column 4 lines 45-48:

> When the upgrade advisor 11 and/or the user have **selected 100 the network resources 3 that
> need to be upgraded**, an upgrade installer 17 oversees the automatic installation of the packages
> to the server.

A determination of which items have already been received is inherent in the selection of

"network resources that need to be upgraded". If a resource does not need to be upgraded, then it

must have already been received. Selection of resources is impossible without determination.

Also column 5 lines 41-45

> In the server upgrader 22, several upgrade packages 7 and the corresponding installation
> instructions 20 are **grouped 108 into a "job"** 18. Within each job 18, the installation instructions
> for every package are included in a control file 18a.

Grouping packages into a job is considered adding to an order list.); *and*

> *thereafter ordering, receiving, and applying said items on said order list* See column 4

lines 45-48 as cited above in addition to column 4 lines 48-53:

> At the outset, the appropriate upgrade packages 7 are **retrieved** 102 from the distribution medium
> (or the on-line service) and **supplied** 106 to a server upgrader 22 located in the upgrade installer
> 17. Installation instructions 20 are retrieved 104 from the database 9 and are supplied 106 to the
> server upgrader 22.

Also column 5 lines 48-63:

> When the job is ready to be installed to the target server, the server upgrader connects with the
> server...and then sends the job...to a staging area. The staging area may...be anywhere else in the
> network capable of handling the deposit and retrieval of upgrade files....the agent executes the
> instructions in the control file **thereby installing the packages from the package directories 71
> to the target network resources 3.**

Stupek column 4 lines 6-9 discloses presenting a list of upgrades to a user:

> When the analysis is complete, the upgrade advisor 11 presents a report and/or graphical display to
> the user.

Stupek takes an original list of available upgrades and analyses it to determine the set of

necessary upgrades. A list is then generated to display the results of the analysis. Stupek further

describes automatic installation of the displayed list using a Package database that describes any

dependencies related to the package in column 7 lines 6-15:

> To enable automatic installation of the package, the database contains the package script 25g (the
> installation instructions for the package). The database also contains information regarding the
> dependencies between the package and other upgrade objects or packages: child dependencies 25h
> are the upgrade objects associated with a package; sibling dependencies 25j are the packages upon
> which a package depends; and parent dependencies 25i are the packages or upgrade objects which
> together constitute a larger package.

However, Stupek does not expressly disclose "adding said corresponding prerequisite items and corequisite items to said first list." However, in an analogous environment, Taylor teaches adding dependency information to a list in column 2 lines 20-23:

> If the dominant package has a dependent package not already installed, the method constructs a ' trailer script process and an action list. The action list has action entries identifying dependent packages not previously installed.

Also see Taylor column 5 lines 29-31:

> If there is an action list, add module 112 adds the name of the dependent package to the action list.

This passage teaches that Taylor adds a package to a preexisting first list.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use Taylor's teaching of adding dependency packages to a list with Stupek's first list. One of ordinary skill would have been motivated to install a multi-package distribution pack with package dependencies on a target system in a single installation operation (Taylor column 1 lines 58-60).

As per claim 3, the above rejection of claim 1 is incorporated. Stupek further discloses the use of an operating system with the computer system (column 1 line 17).

As per claim 4, the above rejection of claim 3 is incorporated. Stupek further discloses the use of a network with the computer system (column 1 line 13).

As per claim 5, the above rejection of claim 1 is incorporated. Stupek further discloses the practice of keeping track of what software has been installed or uninstalled (column 6 lines 45-47).

As per claim 7, the above rejection of claim 1 is incorporated. Stupek further discloses the practice of storing information relating to program updates in a file (column 6 lines 43-45).

As per claim 8, the above rejection of claim 1 is incorporated. Stupek further discloses

the practice of updating software on the computer system (column 5 lines 48-63).

As per claim 9, Stupek discloses:

A system for maintaining software on a computer system (FIG. 1) *comprising:*

a maintenance application having a first list of third maintenance items wherein the first

list comprises a list of maintenance items needed to be applied to said computer system (figure 1

reference 11 "Upgrade Advisor"; figure 1 reference 7 "Resource Upgrades", column 3 lines 31-

43:

> Upgrades to the network resources are provided to a server manager by a distribution medium...

Also column 3 line 57 – column 4 line 7:

> When the upgrades 7 become available to the network (e.g., by inserting the CD-ROM into the
> server manager drive, or by logging into the on-line service), an upgrade advisor 11 in the upgrade
> device 10 automatically analyzes each network resource 3 currently on the server 1 to determine
> the availability and **necessity of the corresponding upgrade** 7. When the analysis is complete,
> **the upgrade advisor 11 presents a report** and/or graphical display to the user.

All other limitations have been addressed in the above rejection of claim 1.

As per claims 11-13, 15 and 16, the above rejection of claim 9 is incorporated. All

further limitations have been addressed in the above rejections of claims 3-5, 7, and 8,

respectively.

As per claim 17, all limitations have been addressed in the above rejections of claims 1

and 9.

As per claim 18, Stupek discloses a computer program product (column 3 lines 31-33).

Stupek further discloses a computer readable medium and program instruction means (column 11

line 9 – column 14 line 33). All further limitations have been addressed in the above rejection of

claim 1.

In regard to claim 20, Stupek discloses: *wherein the database is stored on a different*

medium than the maintenance application. See FIG. 1 elements 9 and 11, and column 3 lines

31-52.

Claims 2 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stupek

et al as applied to claims 1 and 9, respectively, above, and further in view of "Y2K Compliance

and the Distributed Enterprise" by Gowan et al.

As per claim 2, Stupek does not expressly disclose software maintenance on a

mainframe. However, in an analogous environment, Gowan et al. teaches the benefits of

upgrading a mainframe computer system (page 68, paragraph 1). It would have been obvious to

one of ordinary skill in the art at the time the invention was made to use Stupek's software

maintenance system with Gowan's concept of upgrading a mainframe computer in order to

facilitate a swift and automated upgrade process. This is desirable since mainframe computers

serve a large number of users, and having a swift and automated upgrade process ensures the

availability of correct and efficient software.

As per claim 10, all further limitations have been addressed in the above rejection of

claim 2.

Claims 6 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stupek

and Taylor as applied above to the rejections of claims 1 and 9, further in view of "IMS/ESA

Sysplex Data Sharing: An Implementation Case Study" by Boyle et al. (hereinafter "Boyle").

As per claim 6, the above rejection of claim 1 is incorporated. Stupek further discloses

the use of a database application through the use of the "server database" (column 4 lines 14-16).

Stupek does not expressly disclose the use of IBM ServiceLink. However, in an analogous

environment, Boyle teaches that ServiceLink can be used in software maintenance (top of page

32). It would have been obvious to one of ordinary skill in the art at the time the invention was

made to use Boyle's teaching of ServiceLink with Stupek's database. One of ordinary skill

would have been motivated to provide early opportunity to review software maintenance issues

(Boyle: 2nd paragraph of page 32).

In regard to claim 14, the above rejection of claim 9 is incorporated. All further

limitations have been addressed in the above rejection of claim 6.

Claims 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over Stupek and

Taylor as applied to claim 1 above, further in view of IBM SMP/E as described on page 8 of the

originally filed specification (hereinafter "SMP/E").

In regard to claim 19, the above rejection of claim 1 is incorporated. Stupek does not

expressly disclose: *recording what software has been taken off the computer system, and*

recording what software has been cloned. However, in an analogous environment, SMP/E

teaches a software recording application that records what software has been taken off a

computers system, and what software has been cloned. See page 8 lines 5-9:

> One example of such a recording application is a program provided by IBM Corp. known as
> SMP/E. This program can record what software has been put on, track such software, record what
> software has been taken off, and record what software has been cloned, all on an OS/390
> architecture system.

As described in the specification, SMP/E is a "known" application that provides these

capabilities. While supporting documentation of the SMP/E application has not been previously

supplied, this passage clearly describes its use in terms of prior art. It would have been obvious

to one of ordinary skill in the art at the time the invention was made to use the recording abilities

of SMP/E with the Stupek's "MIB". One of ordinary skill would have been motivated to supply

accurate information regarding available resources (see Stupek column 3 lines 28-30). All

further limitations have been addressed in the above rejection of claim 1.

(10) Response to Argument

1. REJECTION OF CLAIMS 1-20 UNDER 35 U.S.C. § 112 (see pages 8-9 of Appellant's

Brief)

On pages 8-9 of the brief, Appellant essentially argues in response to the rejection of

claim 1-20 under 35 U.S.C. § 112 1st paragraph, that the claimed limitations of a "database of all

second maintenance items that are known as being able to be installed" is "explicitly supported"

on page 8 lines 13-22 of the specification (includes a description of "a database of second

maintenance items known as PTF's.") as well as implicitly supported by the description of

searching for items on page 9 lines 6-9 of the specification. Appellant further describes the

database in terms of it being a "master database" with a "global nature." These arguments are

not persuasive.

No explicit or implicit support was found in the cited sections or elsewhere in the specification for a database containing information regarding an ability to be installed. Further, there is no indication in the specification of any knowledge of *all* second maintenance items in a master database with a global nature. Any such "master database" would necessarily contain a "known" list of items. However, the specification does not provide any indication regarding what types of items would be included or excluded on such a list. As claimed, the "master database" would be required to contain a list of all items known under the sun, past, present, and future, that are able to be installed. How would a database acquire the knowledge of *all* items *known* as being able to be installed? Would such a database include commercial software, or would it also include free software? Would it include ActiveX components, Java applets, and other web based software? Would it include buggy software, viruses, spyware, and malware? Would it anticipate the release of new releases and updates? Such items are all *known* as being able to be installed. How would this database be maintained to provide all known items in an industry that is extremely dynamic, with new software items large and small being constantly released by countless providers – some large corporate entities, some independent individuals maintaining private development projects, and everything in-between? Even if it were possible to assemble such a database, practically the moment it's created, it would immediately become out of date, and would no longer be a database of all known items since new known items are constantly created. A database of *all* second maintenance items that are *known* as being able to be installed, as argued by Appellant, is essentially unworkable. The specification simply does not appear to provide any notion, explicit or implicit, of a master database with a global nature.

This issue has been raised previously, and it is maintained that there is simply no support for a

global database of all items that are known as being able to be installed.

Appellant further argues at the bottom of page 8 of the brief, that the global nature is

exhibited in the definitions of the terms "second maintenance items" (see specification page 8

lines 14-15, "second maintenance items known as PTF's" – note that the phrase "Program

Temporary Fixes" as referenced at the bottom of page 8 through page 9 of the brief could not be

found in the specification) and "third maintenance items" (see specification page 9 lines 1-2

"[third] maintenance items needed to be put on to the computer system"). Neither "definition"

provides a clear indication or restriction on interpreting what is meant by the respective terms.

As such, neither contributes to a "global nature" or a "master database," and the argument is not

persuasive.

On page 9 of the brief, Appellant essentially argues that 112 1st is without merit since

"wherein the database is stored on a different medium than the maintenance application" is

supported on p. 7 lines 13-15. Page 7 lines 13-15 of the specification recites the following:

> The computer system is normally the computer system on which one wants to perform software
> maintenance, however this is not required in order to practice the invention.

There is nothing in this passage regarding any storage medium for a database or a maintenance

application. Thus, Appellant's argument is not persuasive.

2. REJECTION OF CLAIMS 1, 3-9, 11-18 AND 20 UNDER 35 U.S.C. § 103(a) OVER

STUPEK IN VIEW OF TAYLOR (see pages 9-14 of Appellant's Brief)

As an initial matter, it is noted that the claim language has been interpreted in light of the

rejection of claims 1-20 under 35 U.S.C. 112, first paragraph, and in accordance with the

specification as being directed to a database with all items that are known by a given entity as being able to be installed, as set forth in the grounds of rejection recited above.

On pages 10-11 of the brief, Appellant essentially argues that "Stupek does not teach that the database has such a global nature." In response to Appellant's argument that the references fail to show certain features of Appellant's invention, it is noted that the features upon which Appellant relies (i.e., a database with maintenance items that are "known as being able to be installed on the computer system, whether the known second maintenance items are included in a particular upgrade packages or not" (see middle of page 14 of the brief), i.e. "master database" with a "global nature" (see top of page 11)) are not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

On pages 11-13 of the brief, Appellant essentially argues that Stupek does not disclose searching for matches of maintenance records for pre/co-requisite items. However, Stupek discloses notifying users of dependency information. See column 7 lines 33-35. Since notification of dependency occurs, a search for dependency information, while it may not be expressly disclosed, is inherent since notification could not occur without a search for the information. Appellant appears to suggest that Stupek is notified of dependency information, and therefore does not properly search for it. However, it is noted that the originally filed specification provides no particular guidance on the requirements of a proper search. Thus, the term can be reasonably broadly interpreted to include, as in Stupek, a situation where notification

messages are searched and recognized as containing dependency information. Therefore,

Appellant's argument is not persuasive.

It is noted that at the top of page 12, Appellant suggests that since the upgrade database is

contained on the CD-ROM, that "the upgrade database is included in the upgrades ... and are not

a separate component." However, Stupek column 3 lines 44-52 (see 4/17/06 Office Action page

7) discloses that resource upgrades are packaged along *with* the upgrade database, and are clearly

separate. Further, these components can also be provided by an "on-line service", and are not

restricted to a CD-ROM distribution (see Stupek column 3 lines 50-52). Thus, the upgrades

would not search the upgrade database as suggested by Appellant.

On page 13 of the brief, Appellant essentially argues that the Taylor reference does not

teach adding dependent packages to an original list of items derived from the first list. However,

Stupek discloses a first list and items derived from the first list (see 10/4/06 Office action page

10), and Taylor teaches adding dependency items to an existing list. Further, Taylor teaches a

preexisting action list, i.e. first list, to which dependency information is added. See Taylor

column 5 lines 29-31:

> If there is an action list, add module 112 adds the name of the dependent package to the action list.

Also, see column 2 lines 7-12:

> Since a dependent package may also be a dominant package, the flow of operations in the
> invention are layered to **add additional entries on the action list for additional dependent**
> **packages** dependent from a dominant package that is dependent from another dominant package.
> [emphasis added]

Thus, Appellant's argument is not persuasive since Taylor clearly teaches adding dependency

information to an initial first list.

On pages 13-14 of the brief, Appellant essentially argues that the Stupek reference does

not disclose ordering, receiving, and applying *after* other steps. However, as submitted

previously (e.g. 9/8/05 Non-Final Action page 4 and 4/17/06 Final Action page 4), broad

interpretation of these limitations read on Stupek column 5 lines 48-63:

> **When the job is ready to be installed** to the target server, the server upgrader connects with the
> server...and then sends the job...to a staging area. The staging area may...be anywhere else in the
> network capable of handling the deposit and retrieval of upgrade files....the agent executes the
> instructions in the control file **thereby installing the packages from the package directories 71**
> **to the target network resources** 3. [emphasis added]

Execution of the instructions in the control file could be broadly interpreted as ordering and

retrieving the upgrade files from the package directories in order to apply them to the system. As

described in the passage, this necessarily occurs at the end of the process since all packages must

be known before they can be installed. Note that this only occurs "When the job is ready to be

installed." The job would not be ready until *after* the other steps have occurred. Thus,

Appellant's argument is not persuasive.

3. REJECTION OF CLAIMS 2 and 10 UNDER 35 U.S.C. § 103(a) OVER STUPEK, TAYLOR AND GOWEN (see page 14 of Appellant's Brief)

Appellant's arguments are identical to previous arguments, and are not persuasive for the

reasons presented above.

4. REJECTION OF CLAIMS 6 AND 14 UNDER 35 U.S.C. § 103(a) OVER STUPEK, TAYLOR AND BOYLE (see page 14 of Appellant's Brief)

Appellant's arguments are identical to previous arguments, and are not persuasive for the

reasons presented above.

5. REJECTION OF CLAIM 19 UNDER 35 U.S.C. § 103(a) OVER STUPEK, TAYLOR

AND SMP/E (see page 14 of Appellant's Brief)

Appellant's arguments are identical to previous arguments, and are not persuasive for the

reasons presented above.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related

Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,
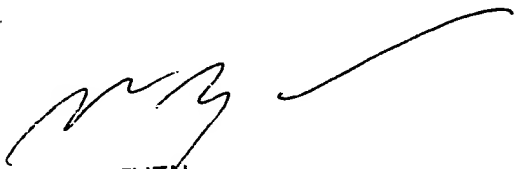
/J. Derek Rutten/
Patent Examiner, AU 2192

Conferees:

Tuan Dam
SPE, AU 2192

Wei Zhen
SPE, AU 2191